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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

U.S. BANK, N.A., Plaintiff, Cross-defendant and Respondent, v. WHITE TAIL CROSSINGS SERIES 1, LLC, Defendant, Cross-complainant, Cross-defendant and Appellant; KIM ROCCONI et al., Defendants, Cross-defendants, Cross-complainants and Respondents.	A152174 (Contra Costa County Super. Ct. No. C1501103)

Appellant White Tail Crossings Series 1, LLC (White Tail) appeals a default judgment entered against it, arguing that the trial court erroneously rejected its motion for relief under Code of Civil Procedure section 473, subdivision (b).[1] We see no merit to the arguments White Tail advances and shall affirm.

I. BACKGROUND

This appeal arises out of a lawsuit brought by Kim and Lawrence Rocconi to establish lien priority among creditors holding or purporting to hold lien interests in a

[1] All statutory citations that follow are to the Code of Civil Procedure unless otherwise specified.

five-acre parcel of land in Oakley, California. The Rocconis purchased the Oakley property nearly three decades ago from Charles Pringle and his wife for $250,000.

The Rocconis allege that shortly before the close of escrow, Pringle presented a promissory note and deed of trust structuring the transaction as follows: Pringle would sell all five acres to the Rocconis, but retain the right to subdivide the five-acre lot into five separate one-acre lots; if Pringle successfully subdivided the property, the Rocconis would keep the one-acre lot upon which their house was located and deed back to Pringle the other four lots; if Pringle was not able to subdivide the property, the Rocconis would be required to pay Pringle an additional $250,000 plus interest upon sale, transfer or conveyance of the property or if they filed for bankruptcy. Under this arrangement, Pringle had 10 years in which to subdivide the property.

The Rocconis allege that they were deceived and unlawfully pressured into signing the new contract, note and deed of trust, by assurances from Pringle that the Rocconis would never have to pay the additional $250,000 because he was certain he could subdivide the property. The Rocconis further allege that Pringle failed to disclose to them material facts about the property, including that Pringle had already tried to subdivide the property without success, and Pringle knew it would be extremely unlikely the county would ever approve a subdivision of the property. The deed of trust, as recorded, identified Ranchettes Unlimited, Inc. as the beneficiary and Pringle as the trustee. Ranchettes Unlimited, by its president Charles Pringle, later assigned the deed of trust to White Tail, another entity owned by Pringle.

Over the years, the Rocconis refinanced their purchase money loan several times. Among those refinancings was a loan in the amount of $500,000 from World Savings Bank. That World Savings refinance loan was secured by a deed of trust against the property, and the deed of trust securing it was recorded with the county recorder. The World Savings deed of trust was eventually assigned to respondent U.S. Bank, N.A. as Legal Title Trustee for Truman 2013 SC4 Title Trust (U.S. Bank).

In the meantime, Pringle was not able to subdivide the property, and, in 2015, White Tail, through Pringle, began foreclosure proceedings against the property by

recording a notice of default and election to sell, asserting that the Rocconis owed White Tail in excess of $500,000, plus interest, on the Rocconis' original purchase money debt, which by then was held by White Tail under an assignment. Those foreclosure proceedings precipitated the dispute in this lawsuit.

A. Procedural History

1. *The Pleadings*

On June 22, 2015, U.S. Bank filed a complaint against the Rocconis and White Tail to establish the priority of its deed of trust over the White Tail deed of trust, and to establish that the White Tail deed of trust was not a valid encumbrance on the Oakdale property.[2] For several months at the outset of the litigation, White Tail was represented by Marcus Brown. Brown, on behalf of White Tail, filed an answer to the complaint, a cross-complaint against U.S. Bank and the Rocconis, and also opposed U.S. Bank's request for a temporary injunction to stop the foreclosure. On January 6, 2016, Glenn Wechsler substituted in as new counsel for White Tail. On May 4, 2016, the Rocconis filed their own cross-complaint against White Tail. On May 17, 2016, Wechsler filed an incomplete form of substitution counsel without naming a successor attorney. There was no trial date on the calendar at the time. On June 18, 2016, Pringle, purporting to act on behalf of White Tail in pro per, filed an answer to the Rocconis' cross-complaint.

2. *Pringle was Admonished Repeatedly to Obtain Counsel for White Tail*

On May 9, 2016, Pringle appeared at a case management conference on behalf of White Tail. The court's minutes note that "Charles Pringle appears for Whitetail Crossings but he is still represented by Glenn Wechsler who fails to appear and no substitution is on file. Mr. Pringle cannot represent the Whitetail entity and he has not obtained new counsel yet so the court is not able to hear from him." Despite the court's

[2] US Bank has filed a request under Evidence Code sections 459 and 452, subdivision (d), asking that we take judicial notice of certain pleadings that were filed in the course or the case. We grant that motion as unopposed.

warning, 11 days later Pringle signed a substitution of attorney consenting to the substitution of himself, in pro per, in place of Glenn Wechsler.

On June 22, 2016, White Tail, through Pringle, filed a motion requesting that the court to direct that, by amendment to U.S. Bank's complaint and the Rocconis' cross-complaint, the name of the defendant "White Tail Crossings LLC" be changed to Charles Pringle, so that Pringle could represent himself in pro per. The motion was initially heard on June 30, 2016, but continued to July 14, 2016 because Pringle failed to comply with notice procedures. On July 14, the court denied White Tail's motion because "White Tail . . . must appear through an attorney. Mr. Pringle cannot represent White Tail since he is not a licensed attorney." The court's minute order also reflects that it "admonishe[d] Mr. Pringle to get counsel for Whitetail in order to continue."

A month later, on August 19, 2016, Pringle appeared for White Tail at another case management conference, and "[t]he court once again admonishe[d] Mr. Pringle that he is not a party to the case so she cannot hear from him." At this case management conference, the court set a trial date of February 6, 2017. A few days later, Marie Quashnock, counsel for the Rocconis, received a telephone call from attorney Robert Biegler in which Biegler and Quashnock discussed Biegler's potential representation of Pringle in *Lynch v. Windus*, another case pending in Contra Costa County Superior Court. In the *Windus* case, Quashnock was representing the Lynches in their action against Pringle based upon facts nearly identical to those alleged by the Rocconis, but involving a different piece of real property that the Lynches purchased from Pringle. During the conversation between Biegler and Quashnock, Quashnock told Biegler about this case. Biegler said he was aware of the case but would not be representing White Tail in it.

On December 6, 2016, Pringle sent a letter to the court. The court declined to accept the ex parte communication and again advised Pringle to seek legal counsel. On December 14, 2016, the court granted the ex parte applications of U.S. Bank and the Rocconis to strike White Tail's answers to U.S Bank's complaint and to the Rocconis' cross-complaint, and to strike White Tail's cross-complaints against U.S. Bank and the

Rocconis, on the ground they were not "in conformity with the laws of this state."[3] White Tail's default on the Rocconis' cross-complaint was entered the next day, and White Tail's default on U.S. Bank's complaint the day after. The defaults and orders striking White Tail's answers and cross-complaint were served upon White Tail on December 20, 2016. And the February 6, 2017 trial date was vacated.

On December 15, 2016, the case was reassigned to a different judge. On January 17, 2017, Pringle brought an ex parte application in front of the newly assigned judge seeking the same relief as his June 22, 2016 motion—an order directing that the name of defendant and cross-complainant from White Tail be to Pringle, by amendment. The newly assigned judge reacted to the situation the same way the prior judge had: He again denied Pringle's request and told him to get counsel for White Tail.

3. *Denial of Motion to Set Aside Default*

In March 2017—ten months after Pringle was first admonished that he could not appear on behalf of White Tail, and over three months after White Tail's defaults were taken—Biegler appeared in this matter on behalf of White Tail. On April 3, 2017, White Tail, through its new counsel, filed a motion for relief from default. The factual basis of White Tail's request to set aside default was briefly set forth in a declaration from Biegler, and the gist of it was as follows: [¶] "3. I have been informed and thereon believe that a default was entered against Defendant/Cross Complainant White Tail Crossings LLC in this matter on December 14, 2016. The default was entered as Defendant/Cross Complainant White Tail Crossings LLC was/is a corporate entity and

[3] (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145 [Section 436 "gives the trial court discretion to strike out all or any part of a pleading not filed in conformity with the laws of this state"].) At the time White Tail's answer to U.S. Bank's complaint was filed—by Marcus Brown, before he withdrew as its counsel—this pleading was "in conformity with the laws of this state." Whether it remained so later, when White Tail was unrepresented, is perhaps debatable. But because U.S. Bank's motion was ex parte, and because White Tail had no counsel through which it could act in opposition to the motion, no objection was made to the striking of the answer on the ground section 436 does not apply.

thus required to be represented by counsel in this matter. White Tail Crossings LLC principal Charles Pringle had attempted to represent White Tail Crossings LLC in this litigation, to protect the legal rights of White Tail Crossings LLC, however Mr. Pringle is not a licensed attorney. The Court determined that White Tail Crossings LLC could not continue in the litigation with Mr. Pringle in that role and entered default on December 14, 2016. [¶] 4. I was retained by Mr. Pringle's son to represent Pringle Sr. and his wife in another case, *Lynch v. Windus* case Contra Costa Superior Court #MSC15-02351, also in this court. During the course of the trial in that case, in early January 2017, I first learned of this matter. Thereafter I learned of the default entered against White Tail Crossings LLC. Pringle Sr., on behalf of White Tail Crossings LLC, recently retained my services (in the last few weeks) to attempt to set aside the default and proceed with the representation on behalf of White Tail Crossings LLC. I then learned that a settlement of the other parties' claim, in this matter, had been reached [*sic*] obviously, does not include White Tail Crossings LLC as a party, due to the default. [¶] 5. A final settlement of all claims in this matter, without including White Tail Crossings LLC, would severely, unfairly compromise the legal rights and remedies of White Tail Crossings LLC. White Tail Crossings LLC has the right to pursue its rights and remedies to a hearing on their merits."

There was no explanation why Pringle did not retain Biegler to represent White Tail until March 2017, when the court ordered him to secure counsel in May 2016. Nothing in Biegler's declaration said anything about any "mistake, inadvertence surprise or neglect" by Biegler, or for that matter by anybody else. There was no declaration from Wechsler. Nor was there any declaration from Pringle, either for himself or for White Tail. The court denied White Tail's motion to set aside the default, finding that Biegler's declaration "does not support granting relief from default under either an excusable neglect or an attorney fault theory." The court further found that Biegler's declaration failed to explain the three-and-a-half month delay in bringing a motion for relief from the default.

The court specifically grounded its ruling on the fact that Pringle was admonished on July 14, 2016 that White Tail must have counsel to proceed, and was admonished again on August 19, 2016 that he could not appear on White Tail's behalf. The court found noteworthy that the defaults of White Tail were not entered until five months after the court first admonished White Tail to obtain counsel, and yet White Tail waited another three and a half months after default to do so. Based upon these facts, the court concluded that the entry of default against White Tail was not the product of excusable neglect or attorney fault. The court also found that the motion for relief under section 473 was not brought within a reasonable time.

After the court denied White Tail's motion to set aside its default, U.S. Bank filed its application for default judgment on its complaint, and the Rocconis filed their application for default judgment on their cross-compliant. The default prove-up hearing on the Rocconis' cross-complaint was held on June 8, 2017. Pringle was present at the hearing and addressed the court.[4] On July 3, 2017 the court entered judgment in favor of the Rocconis. The judgment, among other things, deemed the Rocconis' promissory note paid in full and cancelled White Tail's deed of trust encumbering the Rocconis' property. White Tail now appeals from the default judgment.

II. DISCUSSION

A. Applicable Principles

"Section 473 is a remedial statute to be 'applied liberally' in favor of relief if the opposing party will not suffer prejudice. [Citations.] '[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in

[4] *Harbour Vista, LLC v. HSBC Mortgage Services Inc.* (2011) 201 Cal.App.4th 1496, 1504 ("[A]fter a plaintiff has obtained a default under section 585, the defendant no longer has any right to participate in the case. [Citation.] Under section 764.010, by contrast, the court must 'in all cases' 'hear such evidence as may be offered respecting the claims of *any* of the defendants' (italics added) before it can render judgment. 'Any' defendant has to include a defendant whose default has been taken, and 'all cases' must mean even cases in which a default has occurred. If a defendant shows up before judgment is entered, the court must 'hear such evidence' as this party may offer about its claims, even if the defendant is in default.").

favor of the party seeking relief from default . . . .' [Citations.] 'Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails.' " (*Minick* v. *City of Petaluma* (2016) 3 Cal.App.5th 15, 24 (*Minick*))

"[S]ection 473, subdivision (b) 'contains two distinct provisions for relief from default' [citation]—one makes relief discretionary with the court; the other makes it mandatory. [Citation.] The two provisions differ in several other respects: (1) the mandatory relief provision is narrower in scope insofar as it is only available for defaults, default judgments, and dismissals, while discretionary relief is available for a broader array of orders [citations]; (2) the mandatory relief provision is broader in scope insofar as it is available for inexcusable neglect [citation], while discretionary relief is reserved for '*excusable* neglect' (§ 473, subd. (b), italics added[)] [citation]; and (3) mandatory relief comes with a price—namely, the duty to pay 'reasonable compensatory legal fees and costs to opposing counsel or parties' (§ 473, subd. (b))." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438 (*Martin Potts*).)

A trial court's ruling granting discretionary relief under section 473, subdivision (b) " 'shall not be disturbed on appeal absent a clear showing of abuse.' " [Citations.] The scope of the trial court's discretion under section 473 is broad [citation] and its factual findings in the exercise of that discretion are entitled to deference [citations]. (*Minick, supra,* 3 Cal.App.5th at p. 24.) "On review, appellate courts have repeatedly noted that an abuse of discretion may be found only if a grant of relief 'exceed[s] the bounds of reason.' [Citations.] Given the usual presumption of correctness accorded trial court rulings on appeal, the party attacking a trial court's grant of relief—here [White Tail]—bears the burden of demonstrating error." (*Ibid*.)

"The meaning of section 473, subdivision (b) is a question of statutory interpretation we review de novo. [Citation.] Whether section 473, subdivision (b)'s requirements have been satisfied in any given case is a question we review for substantial evidence where the evidence is disputed and de novo where it is undisputed." (*Martin Potts, supra,* 244 Cal.App.4th at p. 437.) In this case, there is no dispute about the meaning of any of the statutory language in section 473 or the correctness of the legal

principles the trial court applied. Rather, the sole question here is whether the court's determination that White Tail failed to make an adequate showing to support discretionary or mandatory relief under section 473 is supported by substantial evidence. We conclude that it is.

B. Analysis

At the outset, we dispose of White Tail's contention that the trial court erred in rejecting its request for mandatory relief for the simple reason that the only declaration submitted in support of its motion—from Biegler—does not mention any error inadvertence, surprise, or neglect *by him*. Section 473, subdivision (b) makes relief mandatory only if the request for relief "is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect[.]" (§ 473, subd. (b).) In the absence of an attorney declaration making a confession of error, as the statute requires, mandatory section 473 is not available. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609 [attorney affidavit must include "admission by counsel for the moving party that his error resulted in the entry of a default or dismissal" or a "real concession of error"].)

With respect to discretionary relief under section 473, White Tail raises four separate grounds that it claims warranted a finding of mistake, inadvertence, surprise, or excusable neglect. None has merit.

First, White Tail argues that a statutorily qualifying "mistake" occurred when White Tail's former counsel, Wechsler, substituted out as attorney for White Tail on May 17, 2016, leaving White Tail in pro per. We need not decide here whether the substitution was improper—it appears to us that the court effectively treated it as a notice of withdrawal, which, with no trial date pending, it accepted since there would be no prejudice to U.S. Bank and the Rocconis—but regardless of whether Wechsler's substitution may be fairly characterized as a "mistake," it was not an excusable mistake from which Pringle was entitled to be relieved, since it could easily have been rectified had Pringle simply heeded the court's repeated admonitions.

Second, White Tail argues that respondents "took advantage" of the Wechsler substitution by bringing ex parte motions to strike White Tail's answers. White Tail's argument would carry weight only if we ignored the seven months which elapsed between Wechsler's substitution and the ex parte motions, but here again, he ignores the four separate occasions on which the court admonished Pringle to get counsel for White Tail before the answers were stricken Even after retaining counsel—including here on appeal—White Tail never attempted to specify precisely what sort of legal advantage respondents exploited, besides making a motion against an unrepresented entity, which they had no choice but to do in light of Pringle's intransigence.[5]

Third, White Tail argues that Pringle was "confus[ed]" because the court had filed White Tail's answer to the Rocconis' cross-complaint. Even if Pringle was confused—no one filed a declaration saying he was—surely the confusion was dispelled when the court on July 14, 2016, August 19, 2016, and December 6, 2016, unequivocally told him that he could not represent White Tail and had to get an attorney for White Tail. Any confusion was not excusable in light of the admonitions.

Fourth, and finally, White Tail argues that because the trial court had earlier allowed the Rocconis to set aside default, the court should have allowed White Tail to do the same. Suffice it to say that the relief granted to the Rocconis is not before us, was not appealed from, and we presume the order granting it to be correct on the facts presented, just as we presume the order denying relief to White Tail on the facts presented here was correct. White Tail has not borne its burden of overcoming that presumption.

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[5] There is, to be sure, the matter of the striking of White Tail's properly filed answer to U.S. Bank's complaint. (See ante, fn. 3.) But nowhere in its opening brief on appeal, indeed at no point until oral argument—when this court inquired about the issue—did White Tail argue that there may have been a defect in the trial court's December 14, 2016 order striking its answer to U.S. Bank's complaint. We treat the point as waived for failure to raise it on appeal in a timely way. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

Wholly apart from the White Tail's failure to make any showing of cognizable excuse, the trial court was within its discretion to find that White Tail's section 473 motion was untimely. "Numerous courts have found no abuse of discretion in granting relief where the section 473 motions at issue were filed seven to 10 weeks after entry of judgment. [Citations] A delay is unreasonable as a matter of law…when it exceeds three months and there is no evidence to explain the delay." (*Minick, supra*, 3 Cal.App.5th at p. 34; see *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 532; see also *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1184 [stating that the "three-month unofficial 'standard' " established in *Benjamin* " 'remains true today' "].) The delay here exceeded three months without an explanation, at least not one the trial court found persuasive.

We see no reason to extend this opinion by discussing at length the cases White Tail cites in an effort to show error (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249; *Elston v. City of Turlock* (1985) 38 Cal.3d 227; *Pearson v. Continental Airlines* (1970) 11 Cal.App.3d 613; *Reed v. Williamson* (1960) 185 Cal.App.2d 244), except to say that we find them all inapposite. More instructive is *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401 (*Hopkins & Carley*), which said the following about an effort by an appellant who, like White Tail, blamed his "mistake" on the fact he tried to proceed pro se, and, also like White Tail, relied on the policy in favor of hearing cases on the merits when he failed to appreciate problems a lawyer would have noticed: "The law does not entitle a party to proceed experimentally without counsel and then turn back the clock if the experiment yields an adverse result. One who voluntarily represents himself 'is not, for that reason, entitled to any more (or less) consideration than a lawyer. Thus, any alleged ignorance of legal matters or failure to properly represent himself can hardly constitute 'mistake, inadvertence, surprise or excusable neglect' as those terms are used in section 473.' [Citation.] Rather, 'when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel.' " (*Hopkins & Carley, supra,* at p. 1413.)

The *Hopkins and Carley* court also explained that the policy in favor of hearing cases on the merits is not a talisman that may be invoked as a substitute for a proper showing to justify section 473 relief. "As we and many other courts have noted, reviewing courts tend to favor orders granting relief under section 473(b) in order to effectuate a policy favoring trial on the merits over dispositions by default. [Citations.] This policy, however, cannot invariably prevail over competing policies, including those that 'favor getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures.' [Citation.] While ' "courts are liberal in relieving parties of defaults caused by inadvertence or excusable neglect," ' they ' "do not act as guardians for incompetent parties or parties who are grossly careless as to their own affairs. There must be rules and regulations by which rights are determined and under which judgments become final." ' " (*Hopkins & Carley, supra,* 200 Cal.App.4th at p. 1415.)

III. CONCLUSION

Affirmed.

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STREETER, Acting P. J.

WE CONCUR:

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TUCHER, J.

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BROWN, J.